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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1962

No. 258

ROBERT M. ALEXANDER,
Petitioner,

v.

COUNTY BOARD OF ARLINGTON COUNTY
and
COUNTY SCHOOL BOARD OF ARLINGTON COUNTY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND APPENDIX

SAMUEL W. TUCKER
214 East Clay Street
Richmond 19, Virginia
Counsel for petitioner.

Of Counsel.

OTTO L. TUCKER
Alexandria, Virginia

ROLAND D. FALEY
HENRY L. MARSH, III
Richmond 19, Virginia

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
The Facts	3
How the Federal Questions Were Raised	8
REASONS FOR ALLOWANCE OF WRIT	9
CONCLUSION	16
APPENDIX	17

TABLE OF CASES

Borders v. Rippy, (5th Cir. 1957) 247 F. 2d 268	15
Branche v. Board of Education of Town of Hempstead, 204 F. Supp. 150	10, 15
Briggs v. Elliott (E.D.S.C. 1955) 132 F. Supp. 776	12, 13, 15
Brown v. Board of Education (1954) 347 U.S. 1	13, 15
Brown v. Board of Education (1955) 349 U.S. 294	9, 11, 12
Brown v. Board of Education (D. Kan. 1955) 139 F. Supp 468	15
Clemons v. Board of Education (6th Cir. 1956) 228 F. 2d 853	15
Cooper v. Aaron, 358 U.S. 1	11, 15
County School Board v. Thompson (4th Cir. 1956) 240 F. 2d 59, 2 Race Rel. L. Rep. 59	5
Dodson v. School Board of Charlottesville (4th Cir. 1961) 289 F. 2d 439	14

Page

Hamm v. County School Board (4th Cir. 1959) 263 F. 2d 226, 4 Race Rel. L. Rep. 36 5
Hamm v. County School Board (4th Cir. 1959) 264 F. 2d 945, 4 Race Rel. L. Rep. 296 5
Sealy v. Department of Public Instruction (3rd Cir. 1958) 252 F. 2d 898 15
School Board v. Thompson (4th Cir. 1958) 252 F. 2d 929, 3 Race Rel. L. Rep. 187 5
Taylor v. Board of Education of New Rochelle (S.D.N.Y. 1961) 191 F. Supp. 181, 6 Race Rel. L. Rep. 90 ..... 10, 15
Taylor v. Board of Education (S.D.N.Y. 1961) 195 F. Supp. 231, 6 Race Rel. L. Rep. 700 10
Taylor v. Board of Education (2d Cir. 1961) 294 F. 2d 36 10
Thompson v. County School Board of Arlington County (E.D.Va. 1956) 144 F. Supp. 239, 1 Race Rel. L. Rep. 890 ..... 5, 14
Thompson v. School Board (E.D.Va. 1957) 2 Race Rel. L. Rep. 810 5
Thompson v. School Board (E.D.Va. 1958) 166 F. Supp. 529, 3 Race Rel. L. Rep. 931 5
Thompson v. County School Board (4th Cir. 1959) 264 F. 2d 945, 4 Race Rel. L. Rep. 296 5
Thompson v. County School Board (E.D.Va. 1959) 4 Race Rel. L. Rep. 880 5
Thompson v. County School Board (E.D.Va. 1960) 5 Race Rel. L. Rep. 1054 5

OTHER AUTHORITIES

Anno: 65 A.L.R. 1523 11
Anno: 135 A.L.R. 1111 11

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v.

COUNTY BOARD OF ARLINGTON COUNTY
and
COUNTY SCHOOL BOARD OF ARLINGTON COUNTY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered on April 18, 1962, by which the said court affirmed a judgment of the Circuit Court of the County of Arlington dismissing petitioners' motion for judgment against the County Board of Arlington County and others.

OPINIONS BELOW

The unreported opinion of the trial court appears in the transcript on pages 176 through 179 and is appended hereto, *infra* App. 27, et seq. The trial court's order (R.28; *infra* App. 31), by which petitioner's motion for judgment was dismissed, made that opinion a part of the record. The order of the state's highest court affirming, without opinion, the judgment of the trial court (R. 37) is appended, *infra* App. 33.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was dated and entered on April 18, 1962. (R.37; *infra* App. 33). The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257 (3); the petitioner's interests in the questions presented being (1) his personal interest, as a Negro and a parent, that Negro children and particularly his own children will not continue to be victims of deliberate racial segregation in the public schools and (2) his personal interest, as a citizen, voter, property owner and tax payer, that public funds of his county be not pledged for the accomplishment of an unconstitutional objective by which he would be adversely affected.

THE QUESTIONS PRESENTED

1.

Are Fourteenth Amendment rights of Negro children to due process and equal protection violated by a decision of a school board to site a school or substantial school ad-

dition at or near the center of a school attendance area predominately inhabited by Negroes when such decision was reached without giving consideration to any solution by which racial desegregation of public schools might have been facilitated and, particularly, where the school board has a policy that no child be compelled to attend a school in which his race is in the minority?

2.

Are Fourteenth Amendment rights of Negro children to due process and equal protection violated by a decision of a school board to erect an elementary school building of thirty-seven classrooms for the immediate accommodation of more than one thousand children, all of whom are Negroes, when none other of the thirty-three elementary schools has more than twenty-five classrooms or accommodates more than six hundred sixty pupils and the model-sized building has about fourteen classrooms and the average school enrollment is approximately three hundred fifty and, particularly, when the land available for the proposed school is approximately one-third less than that which the State Board of Education would normally require?

STATEMENT OF THE CASE

The Facts

The County School Board of Arlington County decided to enlarge the Drew School at an estimated cost of $950,000, which decision was communicated to the County Board of Arlington County; whereupon the county board petitioned the circuit court to order a bond election. Ac-

cordingly, the court ordered an election to be held on the 7th day of November, 1961, upon the question:

> "Shall the County Board of Arlington County, Virginia, contract a debt, borrow money, and issue bonds of Arlington County, Virginia, in the aggregate principal amount of $950,000.00 for the purpose of providing funds for the construction and acquisition of school improvements in the County, including the purchase of sites for school buildings or additions to school buildings, the construction of school buildings or additions to, or alterations of existing school buildings, and the furnishing and equipping of school buildings or additions to school buildings?"

The petitioner resides in the Drew-Kemper school attendance area and is the father of three children [Tr. 12], the eldest of whom attends Kemper Elementary School [Tr. 18]. Kemper School is one of a complex of three units (Drew, Drew-Annex, and Kemper), neither of which is attended by white children [Tr. 18, 44]; the Drew-Kemper area (like the adjacent Hoffman-Boston area [Tr. 14, 176]) being inhabited primarily by colored people [Tr. 12], and it being the policy of the school board to permit white children living in that area to attend public school elsewhere [Tr. 45]. More than 900 children attend these three elementary school units where they are inadequately housed. The next largest elementary unit is Henry School with an enrollment of 646 and a capacity of 660 [Tr. 54]. The elementary school serving the areas which bound Drew-Kemper and Hoffman-Boston are attended predominantly, where not exclusively, by white children, there being only 33 Negro elementary school children in the

county attending schools with white children. [Tr. 72].

The desegregation of the public schools of Arlington County is the subject of litigation in the United States District Court for the Eastern District of Virginia [Tr. 7]. By order dated July 31, 1956, the district court restrained the school board from refusing on account of race or color to admit to any school under its operation any child otherwise qualified for admission to and enrollment in such school.[1] The subsequent protracted nature of that litigation is indicated by the citations in the footnote. On March 16, 1961, the school board adopted rules and policies as to admissions and procedures for possible placement or assignment of pupils. Section III of which reads, in part:

> "Attendance areas or districts are fixed by the School Board from time to time, subject to the School Board's policy that no children be compelled to attend a school in which his race is in the minority. . . ." [Tr. 45].

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[1] *Thompson, et al, v. County School Board of Arlington County, et al,* (E.D. Va., 1956) 144 F. Supp. 239, 1 Race Rel. L. Rep. 800, affirmed, *sub nom, County School Board v. Thompson,* [4th Cir., 1956] 240 F. 2d. 59, 2 Race Rel L. Rep. 59; cert. den. 353 U. S. 910, 2 Race Rel. L. Rep. 300. *Thompson v. School Board* (E.D. Va., 1957), 2 Race Rel. L. Rep. 810. *Thompson v. School Board* (E.D. Va., 1957), 159 F. Supp. 567, 2 Race Rel. L. Rep. 987, affirmed, *sub nom, School Board v. Thompson* (4th Cir., 1958), 252 F. 2d. 929, 3 Race Rel. L. Rep. 187, *Thompson v. School Board* (E.D. Va., 1958), 166 F. Supp. 529; 3 Race Rel. L. Rep. 931, affirmed, *sub nom, Hamm v. County School Board* (4th Cir., 1959), 263 F. 2d. 226, 4 Race Rel. L. Rep. 36; *Hamm v. County School Board* (4th Cir., 1959), 264 F. 2d. 945, 4 Race Rel. L. Rep. 296. *Thompson v. County School Board* (E.D. Va., 1959), 4 Race Rel. L. Rep. 880. *Thompson v. County School Board* (E.D. Va., 1960), 5 Race Rel. L. Rep. 1054.

In the discussions of the problem of taking care of the children in the Drew-Kemper area who needed classrooms [Tr. 55], no member of the school board suggested anything which might be done to alter the fact that those children are, in effect, racially segregated [Tr. 58]. The board and its members simply refrained from admitting that the proposed addition to Drew School would have the effect of perpetuating the racially segregated character of the school; although the chairman proposed that persons concerned in this phase of the matter should discuss it with the real estate people rather than with the school board [Tr. 57-58. Cf: Tr. 85]. The superintendent of schools knows of no plans calculated to overcome the fact that the school is, in effect, a racially segregated one [Tr. 60]. The school board did not consider altering the boundaries of the attendance area so as to include within it an appreciable number of white children and a smaller number of colored children [Tr. 40]. The school board did not consider including some of the area presently designated as Drew-Kemper into the areas of some of the surrounding school districts [Tr. 47]. In fact, the board gave no consideration to alteration of the boundaries at all [Tr. 54, 166]. The school board did not consider permitting children living in the Drew-Kemper area to attend school in one of the six surrounding areas in which white children attend elementary school [Tr. 166, 167]. The school board did give some consideration to three areas near the perimeter of the Drew-Kemper zone [Tr. 50]; one being the Douglas Park site [Tr. 49] which would be nearer the Randolph School zone [Tr. 50], and the other two being within the Army-Navy Country Club property which would be nearer the Fairlington School zone [Tr. 50]. The Douglas Park site was studied in considerable detail [Tr. 27,

157] and was favored by one member of the board [Tr. 132-135]. The two sites identified as part of the Army-Navy Country Club property were merely presumed to be unavailable [Tr. 160], although assumed to be private property [Tr. 162-163]. The superintendent of schools considered that a fourth site referred to as the property yard was of insufficient quality (or quantity) to be given much consideration [Tr. 156]. No other location seems to have come to the minds of the school authorities [Tr. 164, 165]. With one member dissenting, the board decided to acquire improved [Tr. 127, 131] property in the immediate vicinity of Drew School, which is situated in the center of this area predominantly inhabited by Negroes [Tr. 129], and to enlarge Drew School so that it will have thirty-seven classrooms built on approximately ten acres of land for the immediate accommodation of more than one thousand Negro elementary school children. Standard requirements of the State Board of Education are that a school of that size should have fifteen acres of land available. [Tr. 65].

Of the thirty-two public elementary schools in the county, none has more than twenty-five (25) classrooms. Six schools have nine (9) or fewer classrooms; eighteen schools have not less than ten (10) nor more than sixteen (16) classrooms, eight of these having fourteen (14) classrooms; and only eight schools have eighteen (18) or more classrooms, none exceeding twenty-five (25) classrooms. [Amended Motion for Judgment, par. 8, Tr. 62.] Within the county the model-sized elementary school building has about fourteen classrooms; and the average enrollment in elementary schools in the county is about 350 pupils [Tr. 128]. "Elsewhere in the county, when an elementary building has reached about twenty classrooms [the school board starts] looking for another site." [Tr. 134.]

HOW THE FEDERAL QUESTIONS WERE RAISED

The Amended Motion for Judgment (R. 13; *infra* App. 17-20 alleges that the unexpressed purpose of the school board in adopting the resolution [pursuant to which the county board requested the circuit court to order the election] is to continue to discriminate against Negro School children contrary to the equal protection and due process requirements of the Fourteenth Amendment to the Constitution of the United States and that such will be the inevitable result of the proposed school construction. For that and other stated reasons, the pleading prays a declaration of the illegality of the issuance of any bonds pursuant to said election. In his opening statement to the trial court, counsel for the plaintiff asserted that the purpose of the school board was to cement and perpetuate the existing pattern of racial segregation and to avoid the duty to bring about a desegrated school system, all in violation of the rights of Negro public school children under the Fourteenth Amendment. (Tr. pp. 4, 5, *infra* App. 21, 22). At the conclusion of the trial, the judge expressed his understanding of the plaintiff's contention that the solution adopted by the school board "perpetuates what is, in fact, a segregated situation" and thus indicates arbitrary, capricious and discriminatory conduct. (Tr. 176-77, *infra App.* 27, 28); but, noting an irreconcilable conflict in judicial opinion as to the nature and extent of the duty of school boards under the *Brown* decision and being of opinion that such duty does not extend to promoting integration of the school system (Tr. 178-79, *infra* App. 29, 30), the trial judge resolved the issue against the petitioner.

The petition to the Supreme Court of Appeals of Virginia for a writ of error assigned that the trial court erred

in holding that the plaintiff failed to show that the purpose of the defendants, with reference to the anticipated proceeds of sale of the subject bonds, is to continue to discriminate against Negro school children contrary to the equal protection and due process requirements of the Fourteenth Amendment to the Constitution of the United States. The contentions of the petitioner with respect to that assignment were rejected by the highest court of the state when it refused the writ applied for.

THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I

The State Court Decided A Federal Question of Substance Not Heretofore Determined By This Court And Decided It In A Way Not In Accord With Applicable Decisions of This Court.

Whether public school construction may be arbitrarily sited where its use by any of the white children in the school system would be unlikely *is* a federal question of substance. Insofar as most of the Negro public school children in the nation are concerned, a holding that such is constitutionally permissible would reduce to a dead letter the directive in *Brown* v. *Board of Education* (1955), 349 U.S. 294, that school authorities effectuate a transition to racially nondiscriminatory school systems operated in accordance with the constitutional principles enunciated in the May, 1954, decision (347 U.S. 483) which held separate educational facilities to be inherently unequal. At least two federal district judges have been confronted with this problem and have recognized the conflict between convenience to

the school authorities on the one hand and the constitutional interests of the Negro school children on the other; and each of them resolved the question in the light of the duty of the school board to initiate and pursue a program calculated to end the separation of Negro children in the public schools from others of similar age and qualifications, without regard for the historical causes of such separation. *Taylor* v. *Board of Education of New Rochelle* (S.D.N.Y., 1961) 191 F. Supp. 181, 6 Race Rel. L. Rep. 90, affirmed (2d Cir., 1961), 288 F. 2d 600; *Taylor* v. *Board of Education* S.D.N.Y. 1961), 195 F. Supp. 231, 6 Race Rel. L. Rep. 700, affirmed (2d Cir., 1961), 294 F. 2d 36, stay denied 368 U.S. —, 82 S.Ct. 382. *Branche* v. *Board of Education of Town of Hempstead* (E.D.N.Y., 1962), 204 F. Supp. 150.

In the instant case the state court not only was of the opinion that the school board had no duty to bring about the elimination of racial segregation in the public schools but held that, notwithstanding alternatives readily apparent which would serve to diminish racial segregation, it was constitutionally permissible for the school board to spend public funds to enlarge upon and perpetuate its errors of the past and thus make certain that unborn generations of Negro children will be separated in the public schools from others of similar age and qualifications. The stubborn resistance of the school board in the federal court litigation pending since 1956 (which has succeeded in limiting to 33 the number of Negro elementary children who presently escape racial segregation) and the school board's policy pronounced in March 16, 1961 (which insures that no white child will attend the proposed school), can leave no doubt of the school board's hostility to the principle enunciated in the *Brown* decision. The excerpt from the testi-

mony of the superintendent of schools concerning the possibility of altering the school boundaries to facilitate desegregation taken from pages 166 and 167 of the transcript (*infra* App. 26, 27) further demonstrates the determination of the school authorities to follow the course of action which will best limit the number of Negro children who might attend schools with white children.

"The wide discretion which administrative officers possess in changing the boundaries of school districts must be exercised in good faith for the best interests of the people of the districts affected, upon terms that are just and equitable, and which do not cause unnecessary hardship; and, if exercised in such a fraudulent, arbitrary, or unreasonable manner as to constitute an abuse of discretion, the courts will interfere in behalf of the districts or voters injured thereby." Annotation: 65 ALR 1523. Supplemental Annotation: 135 ALR 1111. Here the discretion to retain the boundary and to educate the Negro children confined thereby in an oversized elementary school unit unlike any other in the county was exercised in arbitrary disregard of the personal interest of more than 900 Negro children in admission to public schools as soon as practicable on a nondiscriminatory basis, in arbitrary disregard of the interests of the Negro community, reflected in the election returns [Tr. 24], that Negro children attend desegregated schools, and, also, in arbirtray disregard of the public interest in the systematic and effective *elimination* of the racially confining school zone boundaries and other obstacles presently hindering a transition to a racially nondiscriminatory school system. Cf. *Brown* v. *Board of Education* (1955) *supra*; *Cooper* v. *Aaron* (1958), 358 U.S. 1.

Courts Are In Hopeless Conflicts As To The Extent Of The Duty Of School Authorities To Initiate And Accomplish School Desegration.

Forty-five days after this Court's remand of *Briggs* v. *Elliott* (*Brown* v. *Board of Education* [1955] 349 U.S. 294), the United States District Court for the Eastern District of South Carolina "convened to hear any concrete suggestions [from counsel] . . . as to the decree it should enter"; but before entertaining such suggestions and settling its decree, that court delivered its *per curiam* interpretation of the holding of this Court in the school desegregation cases, the most frequently quoted part of which follows:

> ". . . [I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. *It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains.* This, under the decision of the Supreme Court, the State may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. *The Constitution,*

> *in other words, does not require integration. It merely forbids discrimination.* It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals." *Briggs* v. *Elliott* (D.C.E.D. S.C., July 15, 1955) 132 F. Supp. 776 [Italics supplied].

The quoted dictum from *Briggs* v. *Elliott*, supra, and particularly the part above emphasized, has repeatedly been reflected in briefs and in opinions with the result that the rights of Negro children and the corresponding duty of school boards as first stated in *Brown* v. *Board of Education, supra*, and later reiterated in *Cooper* v. *Aaron, supra*, have come to mean little more than the right of the Negro child to litigate and the privilege of the school board to withhold relief until otherwise specifically required by the court.

The first memorandum opinion of the district court in the Arlington County School litigation was this:

> "It must be remembered that the decisions of the Supreme Court of the United States in Brown v. Board of Education, 1954 and 1955, 347 U.S. 483 and 349 U.S. 294, do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of that court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school,

> because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate." *Thompson* v. *County School Board of Arlington County* (E.D. Va., 1956) 144 F. Supp. 239.

The subsequent litigation in that case, index to which footnote 1 affords, represents a series of reviews of administrative decisions that individual children were disqualified for attending schools with similarly situated white children by reason of geographic, academic, psychological, and other criteria which have not been used to disqualify white children. (See *Dodson* v. *School Board of Charlottesville*, 4th Cir. 1961) 289 F. 2d 439.)

The net result is that notwithstanding the active litigation reflected in footnote 1, only 33 Negro elementary school children attend public schools with white children in Arlington County, Virginia; that virtually under the shadow of the nation's Capitol we yet have 1374 Negro elementary school children [Tr. 74] as rigidly segregated by reason of their race as if the opinion in *Brown* had never been written. A further result is that the school board is assured that it is within its right to prevent any appreciable change.

The school board of Hempstead, New York, contended that it had no affirmative legal duty to integrate educational facilities; that there is no such legal duty as distinguished

from a duty not to segregate children racially for educational purposes. Rejecting such contention in *Branche* v. *Board of Education, Town of Hempstead* (E.D. N.Y., 1962) 204 F. Supp. 150, Judge Dooling noted the cases of *Borders* v. *Rippey* (5th Cir. 1957) 247 F. 2d 268, 271; *Sealey* v. *Department of Public Instruction*, (3rd Cir. 1958) 252 F. 2d 898; *Brown* v. *Board of Education* (D. Kan. 1955) 139 F. Supp. 468, 470; *Briggs* v. *Elliott* (E.D. S.C. 1955) 132 F. Supp. 776, 777, and suggested their conflict with *Brown* v. *Board of Education* (1954) 347 U.S. 483, (1955) 349 U.S. 294; *Cooper* v. *Aaron*, (1958) 358 U.S. 1; *Clemons* v. *Board of Education* (6th Cir. 1956) 228 F. 2d 853.

The conclusion reached in the Hempstead case is quite consistent with the earlier decision of Judge Kaufman in *Taylor* v. *Board of Education of New Rochelle*, 191 F. Supp. 181, that necessarily implied in the proscription of segregation is the positive obligation of eliminating it.

Incessant debate concerning the duty of school authorities and the rights of individual children or groups of children serves neither the personal interest of Negro children and their parents that children attend public schools on a racially nondiscriminatory basis nor the public interest that all hindering obstacles be eliminated in a systematic and effective manner.

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition should be granted.

SAMUEL W. TUCKER.
214 East Clay Street
Richmond 19, Virginia

Counsel for petitioner.

OTTO L. TUCKER
901 Princess Street
Alexandria, Virginia

ROLAND D. EALEY
420 North Fourth Street
Richmond 19, Virginia

HENRY L. MARSH, III
214 East Clay Street
Richmond 19, Virginia

Of Counsel.

APPENDIX

[Record: pp. 13 et seq.]

AMENDED MOTION FOR JUDGMENT

Plaintiff moves the Circuit Court of the County of Arlington for a judgment declaring the invalidity of any bonds which hereafter may be issued by the County Board of Arlington County pursuant to an election had on the 7th day of November, 1961, upon the question:

> "Shall the County Board of Arlington County, Virginia, contract a debt, borrow money, and issue bonds of Arlington County, Virginia, in the aggregate principal amount of $950,000 for the purpose of providing funds for the construction and acquisition of school improvements in the County, including the purchase of sites for school buildings or additions to school buildings, the construction of school buildings or additions to, or alterations of existing school buildings, and the furnishing and equipping of school buildings or additions to school buildings?",

such election having been directed by an order of the Circuit Court of Arlington County, Virginia, entered on October 10, 1961, in a certain action or matter at law therein pending, numbered 8364 and styled "In The Matter Of Providing Funds For Public School Improvements And Property In Arlington County Virginia, By The Issuance Of Bonds Of Arlington County, Virginia, In The Aggregate Principal Amount of $950,000." Plaintiff is a voter and taxpayer in Arlington County, Virginia and is a Negro and a parent of an elementary

school child residing within the attendance area of the Drew-Kemper School. Plaintiff says that the issuance of such bonds would be invalid for the following and other reasons:

* * *

4. The chief expressed purpose of the County School Board of Arlington County in adopting the resolution pursuant to which the County Board of Arlington County requested the circuit court to order the said election, was and is to build twenty-two new classrooms, a new multipurpose room, a library, administrative offices, a clinic and other school facilities in the Drew-Kemper School area. Execution of that purpose will result in there being an elementary school building of thirty-seven (37) classrooms located on approximately ten acres of land within the Drew-Kemper School area.

5. The unexpressed purpose of the school board in adopting its said resolution is to continue to discriminate against Negro school children contrary to the equal protection and due process requirements of the Fourteenth Amendment to the Constitution of the United States. As is hereinafter shown, such will be the inevitable result of the proposed school construction next above mentioned.

6. It is a fact, within the knowledge of the school board, that none but Negroes attend school within the Drew-Kemper School area; and it is contemplated by the school board that none but Negroes will attend school there at any time in the foreseeable future.

7. Standard requirements of the State Board of Education are that a school of the size contemplated should have fifteen (15) acres of land available. The State Board of Education has not been requested to waive one-third of its land area requirements as to the other elementary schools in the county.

8. Of the thirty-two public elementary schools in the county, none have more than twenty-five (25) classrooms. Six schools have nine (9) or fewer classrooms; eighteen schools have not less than ten (10) nor more than sixteen (16) classrooms, eight of these having fourteen (14) classrooms; and only eight schools have eighteen (18) or more classrooms, none exceeding twenty-five (25) classrooms.

9. The school board would not build as large a school on as little land as they contemplate in the Drew-Kemper School area if it were expected that white children would be taught therein. The only reason why the school board desires to locate such a structure in that area is to avoid a present possibility and a future probability that Negro school children might successfully claim the right to attend one or more of the schools which white children attend, in areas surrounding the Drew-Kemper area, upon a showing that such schools have adequate capacity and that the Drew-Kemper Elementary School is not sufficient to accommodate all of the children encompassed within its boundaries which were drawn so as to include the residence of all or practically all of the Negro families who live in that part of the county.

WHEREFORE, plaintiff moves the court to declare

the illegality of the issuance of any bonds pursuant to the election upon the question hereinabove stated.

ROBERT M. ALEXANDER, *Plaintiff*
Arlington, County, Virginia

TRANSCRIPT

* * *

Wednesday, February 28, 1962

The above-entitled matter came on for hearing before the Honorable Walter T. McCarthy, in the Circuit Court of Arlington County, Virginia, at 10:03 a.m., February 28, 1962.

* * *

APPEARANCES:

On behalf of the plaintiff:

S. W. Tucker, Esq.,
214 East Clay Street,
Richmond 19, Virginia,

and

Otto L. Tucker, Esq.,
901 Princess Street,
Alexandria, Virginia,

and

Robert M. Alexander, Pro se

* * *

On Behalf of the Defendant, County Board of Arlington County:

Peter J. Kostik, Esq.,
2116 Wilson Boulevard,
Arlington, Virginia.

On behalf of the Defendant, School Board of Arlington County:

James H. Simmonds, Esq.,
15th N&N Court House Road,
Arlington, Virginia.

PROCEEDINGS

* * *

THE COURT: All right. Go ahead and make your statements.

—4—

MR. S. W. TUCKER: This is a motion for judgment, the purpose of which is to contest the validity of a certain bond election last November in which the obligation for the contracting of debt by the County for $950,000 was approved, the stated purpose of the amount being the erection of certain schools in the Drew-Kemper School District.

The position of the plaintiff here is two-fold: that is, that there were certain surplus funds that were available to the school board of which the public was not generally made aware, and had the public been made aware it is doubtful whether the public would have voted the approval of the bond issue in the amount that it did.

The other principal ground is that the purpose of the school board, in its proposed erection of a school in this area, was to cement or perpetuate this existing pattern of racial segregation and thereby to deny the Negro children living within that area the right to desegregate, which the Supreme Court has said is constitutionally theirs.

Our position is that their action was designed towards continuing to avoid their duty to bring about a desegregated school system, and it is designed to freeze these children into a school in which they will be separated from others because of their race, in violation of their rights under the Fourteenth Amendment.

So, we say the underlying purpose of the bond issue being one that is in conflict with the purpose of the Constitution of the United States, and the entire thing is tainted with unconstitutionality, which we say affects its validity.

That, in a nutshell, is the nexus of the position of the plaintiffs here.

—6—

* * *

MR. SIMMONS: If it please the Court, on behalf of the School Board of Arlington, we filed petition in which it is denied that there was any withholding of any information regarding this so-called surplus from the County Board or from the public.

Actually the testimony will show that the existence of

the anticipated surplus was transmitted to the County officials some time in the latter part of August, 1961, and —7— as Mr. Kostik said, the evidence will show that that was published in the Sun on October 3rd, and the subject of a full discussion by the County Board on October 7th.

With respect to the allegation with respect to the Drew-Kemper School, the position of the School Board is that they caused numerous studies to be made, public hearings to be had, and went into every possibility as thoroughly as could be done to determine what was the best situation or best solution to provide adequate schools for the children in this particular area, and that this decision to build the type of school on the ground available, after getting permission from the State Board of Education, was a sound administrative decision based upon adequate evidence, and is not a subject of judicial review to determine the wisdom of that decision, although we feel that any court which had the power to rule on the matter would come to the same conclusion, and that also the matter of the alleged perpetuation of a segregated situation has been the subject of some litigation in the United States District Court for the Eastern District of Virginia. The School Board is, at the moment at least, under an injunction by that Court not to deny the Negroes the equal protection of the law and to refuse to admit them, and they are enjoined from refusing to admit the Negroes on account of race. So, it seems to me that the School Board is under duty not only by reason of the injunction, but by the declaration —8— that they cannot discriminate. They are under a duty to do that, and it cannot be presumed by this Court that the School Board will violate the law in that respect.

—58—

* * *

ROY E. REID,

having been previously duly sworn, was called as a witness by and on behalf of the plaintiff and testified as follows:

DIRECT EXAMINATION

BY MR. S. W. TUCKER:

Q. Will you state your name, address, and occupation?

A. I am Roy E. Reid, Division Superintendent, Arlington County Schools: office address, 1426 North Quincy Street.

Q. How long have you been Division Superintendent, sir?

A. Since July 1, 1958.

—59—

* * *

Q. Mr. Reid, I ask you if you are aware of any plans, either in your office, or of the School Board, that are calculated to overcome the fact that the Drew School unit serves only Negro children?

MR. SIMMONDS: If your honor please, I object to that question. It is immaterial, as far as this case is concerned, and has no legal requirement that that be done, and it is certainly immaterial here whether or not they have done that.

The question suggests that it is a duty on the Board to overcome it, to use his words. The Courts have re-

peatedly held in the cases involving desegregation that there is no requirement that there be integration, merely that no child be denied admission to a particular school because of his race, and I object to this question as being immaterial and irrelevant.

THE COURT: Well, I do not necessarily disagree with what you say. I don't believe this really entirely covers the possibility of argument, and he may know an answer to this question, in addition to which it is kind of useless for the Court to rule out this kind of evidence. We haven't got any jury. He is entitled to have it in the record.

Objection overruled.

MR. SIMMONDS: Exception.

THE WITNESS: Would you re-state the question?

—60—

MR. S. W. TUCKER: Would you read the question back?

(The Reporter read the question as follows:

"Mr. Reid, I ask you if you are aware of any plans, either your office or the School Board, that are calculated to overcome the fact that the Drew School unit serves only Negro children?")

THE WITNESS: No.

MR. S. W. TUCKER: There are no such plans.

* * *

—152—

ROY E. REID,

having been previously duly sworn, was called as a witness, by and on behalf of the Defendants, and testified as follows:

—158—

* * *

CROSS EXAMINATION

* * *

—166—

BY MR. S. W. TUCKER:

Q. I think from some witness yesterday we asked this question, but we will ask you.

Was consideration given to solving the problem by changing the lines of the school zones?

A. Not to my knowledge.

Q. Was consideration given to solving the problem by permitting children who live in that area to attend schools in some other area?

A. No, because there was no place for them to attend in some other area.

Q. Do I understand that part of your answer that followed the word "No," that you excluded the possibility of their attending Randolph School, or Henry School, or Claremont School, or Abingdon School, or Fairlington, or Oakridge School?

—167—

A. That's right.

Q. There is no physical barrier to prevent children

who live in the area now marked Drew-Kemper from attending any schools that I have mentioned, is there?

A. I don't know what you would identify as "physical barriers."

Q. It is not physically impossible?

A. No, they are contiguous area.

Q. The schools are accessible to children living in that area?

A. They can be reached from that area.

Q. But no thought was given to that because those schools are schools which are primarily identified as White schools?

A. I couldn't agree with you on that at all.

Q. I withdraw that.

But it is a fact, those schools are identified as white schools?

A. Not necessarily so, because one—at least one of them, and I don't have these figures in front of me, either,—but at least one of them have children of both races enrolled in it.

* * *

—176—

THE COURT: In so far as the first charge is concerned, $372,000, the Court is of the opinion that there is no evidence to support that charge. It is denied.

In so far as the second charge is concerned, it seems to me that we have points of view here which, apparently, are in irreconcilable conflict. As I understand, the com-

plaintant's contention is that because a solution taken by the School Board is a solution which, in effect, perpetuates what is, in fact, a segregated condition, that this clearly —177— indicates an arbitrary, capricious and discriminatory conduct on the part of the Board.

I think there might be some question, in the first place, whether it perpetuates such a condition. The testimony of Mr. Alexander indicated that there has been a change in the location of population in Arlington County with reference to race. I doubt it has been as great as across the river, but this is purely an argumentative thing: whether people are going to stay where they are and, of course, the fact these people are colored, to some extent, chooses the location of their homes. I do not have the slightest doubt that possibly this might have been influenced by the use of restrictive covenants, but this barrier to integration has long since been removed by the Decision of the Supreme Court, so that the reason that helped to produce this segregated area has now gone out of existence, and is no longer effective.

Certain areas he speaks about, the colored people are moving out of. I happen to have lived here quite a few years, and I know colored people lived in Rosslyn; they lived in Cherrydale, they lived in Falls Church, they lived at Boston, they lived in the area around Livingston Heights, and all those areas they have moved out of, apparently from economic choice. There was no way to force them out. I suppose because they got better prices for their property, they thought it was not worthwhile to hold onto it.

Of course, this same thing exists over in the District of Columbia, but it has been just the reverse there. You have two schools—a technical high school and a central high school, which were both occupied by white children, which, as I understand, is fully occupied by colored children.

So, this business of perpetuating this sort of thing is just a guess. Nobody knows where people are going to live, and the segregation of people like this in these areas is, of course, not confined to colored people and white people; it is an economic thing.

It just so happens there is an article in the Saturday Evening Post, in the last few weeks, on the subject of the rise of economic power in the colored race in this country; so, if that be one of the reasons, possibly this will tend to obliterate this condition.

But assuming even that it does cement a fixed position, it appears to me a lot of these questions that you raise are premature. I don't think I am concerned with this right of transfer at this time. It might be that that is unconstitutional. I don't think that would necessarily have the effect of destroying the school districts, if it just ended the right to transfer one from another, if you hold it was unconstitutional, and I don't think it should be ruled upon until it is presented.

—179—

The gist of the thing seems to come down to whether or not the School Board is under a duty not to end segregation but to promote integration, and this is one

of the things that I think is where the irreconcilable conflict lies.

Certainly, you all don't agree on this, and on this I am inclined to agree with Mr. Simmonds.

I don't think there is any duty to promote integration, and I don't think it follows, because they took the one solution which you say cements the segregation, this necessarily means that it was done solely because they wanted to promote segregation.

It did seriously consider locating this school in another area in the same district, which would have been closer to the borderline, of course, and on the basis of the testimony given by Mr. Stockard, they certainly honestly considered it and discarded it, not because it would result in bringing the school closer to a white area, but because the physical aspects and economic aspects of it didn't justify it.

As far as any other claims are concerned, I don't think there has been any evidence produced to the Court that they had any other choice, and the burden of proof is on the plaintiff in this case.

The case is dismissed.

[Record—p. 28]

IN THE CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA

At Law No. 8440

ROBERT M. ALEXANDER,
Plaintiff,

-vs-

COUNTY BOARD OF ARLINGTON COUNTY, et als,
Defendants.

The 28th day of February 1962 and the 1st day of March, 1962, came the parties and their respective counsel.

WHEREUPON none of the parties requiring the services of a jury, all matters of law and fact were presented to the Court for determination.

UPON CONSIDERATION WHEREOF for the reasons stated in its opinion, a transcript of which will be made a part of the record, it is the following JUDGMENT OF THE COURT:

1. That the Motion for Judgment be and the same hereby is dismissed.

2. That the bond issue of $950,000 for school purposes voted at the election held on November 7, 1961, be and the same is hereby validated, pursuant to Article 6 of Chapter 19.1 of Title 15 of the Code of Virginia, as amended.

3. That the defendants recover of and from the plaintiff their costs in this behalf expended, to which said ruling of the Court the plaintiff by counsel excepted and indicated his intention to petition the Supreme Court of Appeals of Virginia for an appeal.

ENTER: March 6th, 1962.

s/ WALTER T. McCARTHY
Judge

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p. 29

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

Robert M. Alexander, plaintiff, gives notice of his application to the Supreme Court of Appeals of Virginia for a writ of error to the judgment of the Circuit Court of the County of Arlington entered on the 6th day of March, 1962, in the above captioned action, by which judgment the plaintiff's motion for judgment was dismissed.

The Assignments of Error are:

* * *

II. The court erred in holding that the plaintiff failed to show that the purpose of the defendants, with reference to the anticipated proceeds of sale of the subject bonds, is to continue to discriminate against Negro school children contrary to the equal protection

and due process requirements of the Fourteenth Amendment to the Constitution of the United States. to the Constitution of the United States.

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* * *

VIRGINIA: p. 37

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 18th day of April, 1962.

The petition of Robert M. Alexander for a writ of error to a judgment rendered by the Circuit Court of Arlington County on the 6th day of March, 1962, in a certain motion for judgment then therein depending, wherein the same petitioner was plaintiff and County Board of Arlington County was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

* * *

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FILED
AUG 16 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 258

ROBERT M. ALEXANDER, *Petitioner*,

v.

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA

and

COUNTY SCHOOL BOARD OF ARLINGTON COUNTY, VIRGINIA

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

WILLIAM J. HASSAN
PETER J. KOSTIK
Court House
Arlington, Virginia
Counsel for the County Board of Arlington County, Virginia, Respondent

JAMES H. SIMMONDS
15th St. & N. Courthouse Road
Arlington, Virginia
Counsel for the County School Board of Arlington County, Virginia, Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Jurisdiction	2
Question Presented	2
Statement of the Case and the Facts	2
Argument	6
I. The Petitioner Does Not Present a Case for Review by This Court Under 28 USCA § 1257 (3)	6
II. There Is No Substantial Federal Question Involved	7

TABLE OF CITATIONS

CASES:

N.A.A.C.P. v. *Alabama*, 78 S. Ct. 1163, 357 U.S. 449, 2 L. Ed. (2) 1488 (1958)	7
Thompson v. *Arlington County School Board*, 204 Fed. Supp. 620	9
Tileston v. *Ullman*, 318 U.S. 44, 63 S. Ct. 493 (1943)	6
Voeller v. *Neilston Warehouse Co.*, 61 S. Ct. 376, at 378; 311 U.S. 531, 85 L. Ed. 322 (1941)	6

OTHER AUTHORITIES:

28 USCA § 1257 (3)	6
Code of Virginia of 1950, as amended, § 15.666.29	3
Constitution of Virginia, § 115a	3

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

JURISDICTION

Respondents submit that this Court does not have jurisdiction because (1) no constitutional right personal to the Petitioner is alleged to have been violated and (2) no substantial Federal question is involved because (a) it is apparent from the record that negro

children in Arlington County are not the victims of deliberate segregation in public schools; and (b) the improvement of public schools and the use of public funds therefor is not an unconstitutional objective.

QUESTION PRESENTED

The real question presented is this:

Should this Court take jurisdiction to review a State Court judgment validating a bond issue of $950,000.00 for school purposes voted at a duly called election and upholding a school board decision relating to the location, size and financing of a school building as not being arbitrary, unreasonable, capricious, and discriminatory, solely because one individual parent and taxpayer alleged, but did not prove in the Trial Court that the "unexpressed purpose" of the school board was to continue to discriminate against negro children and without even an allegation that any 14th Amendment rights of such individual plaintiff were violated?

STATEMENT OF THE CASE AND THE FACTS

In order to meet the needs of the increasing school population in Arlington County, the County School Board has, in the past years, constructed many new schools (40)* and substantially enlarged a number of existing schools. (114) The School Board determined that there was need for additional classrooms in the Drew-Kemper area (a school district, the schools of which are at present attended primarily by negro children). The School Board further determined that in order to finance the needed classrooms in said area, that it would be necessary that a bond issue for such pur-

* Figures in parenthesis refer to pages of the typewritten transcript of proceedings.

poses be submitted to the electorate. (The Constitution of Virginia, § 115a requires any such debt to be submitted to the approval of the majority of the voters in the County). Accordingly, the School Board, pursuant to the Virginia statute for such cases made and provided (§ 15-666.29 of the Code of Virginia, 1950, as amended) by resolution, requested the County Board of Arlington County (the governing body of the County) to adopt a resolution calling for an election on the question. The County Board did so and the electorate approved the contracting of a debt, borrowing money and issuing bonds of Arlington County in the amount of $950,000.00 for the purpose of providing funds for the construction and acquisition of school improvements in the County. A brochure informing the people that the $950,000.00 school bonds were to be used for the enlargement of the schools in the Drew-Kemper area and requesting the approval by the voters of the County, was mailed to most of the registered voters in the County under the auspices of the County Board and the County School Board (88, Ex. E). After the approval by the electorate of the bond issue for the said purposes, the petitioner filed a motion for judgment with the Circuit Court of Arlington County, Virginia, asking the Court to declare the illegality of the issuance of any bonds pursuant to the said election. The School Board intervened and asked validation of the bond issue. Of the several issues raised in the said motion for judgment, only one remains at this time, to-wit: the contention that the "unexpressed purpose" of the County School Board in adopting its resolution (asking the County Board to call an election) is to continue to discriminate against negro school children contrary to the equal protection and due process clauses of the 14th Amendment to the Constitution of

the United States. The Trial Court ruled that the plaintiff had not sustained the burden of proof in the case and accordingly dismissed the same.

In addition to the above, the testimony developed the following specific facts regarding the Drew-Kemper situation:

To meet the need for additional classrooms in the Drew-Kemper area, more time was spent by the Board members and staff in trying to determine what was the best educational plan than in any other part of the tremendous buiding program. (40) All sites suggested were investigated and only three were suggested in addition to the area around Drew-Kemper. (41) These other three were found not suitable by the Board. One Board member preferred the Douglas Park site, but admitted that the other members acted in good faith and that race played no part in the decision (144, 145). The absence of an optimum new school site within the area of overcrowding, required consideration of enlarging Drew school. While the proposed addition would make it the largest elementary school in the County (as one must be), the School Board first ascertained that it would not be unique in size or capacity. Mr. Ray Reid, Superintendent, testified that in the metropolitan area of Washington there were twenty schools having an equal or greater capacity than the proposed Drew-Kemper addition. The same was true of thirty-six elementary schools in fourteen different school divisions in Virginia. (88, Ex. K) It is true that the State standard for site size was not met and a waiver was required. But of the thirty-three elementary schools in Arlington, twenty-four had less than the State standard site size. (86-87, Ex. J) The matter was under study from October, 1959 until Sep-

tember, 1961, and there were a series of public hearings, studies, engineering surveys, architectural studies and many school board discussions. (90, Ex. L) The attitude of parents of the children in the Drew-Kemper area was sought and its Parent Teacher Association voted 89 to 18 in favor of the plan which the Board subsequently adopted. (91, 92)

Ray E. Reid, the Division Superintendent for Arlington County, with over thirty-five years of experience in all phases of education in Virginia, (154, 155) testified that there was a need for an adequate facility in the Drew-Kemper area "so that these children be housed where they live," and would not have to be distributed in several different sites (156); that an elementary school of the size proposed was educationally and administratively sound; and that he recommended the proposal which was adopted by the School Board. (89, 157)

Other facts are: the entire Arlington County School system is desegregated (76); the petitioner has not made application to transfer his child out of the Drew-Kemper district; and, (as brought out by the Judge of the trial court) not a single application for transfer of a child out of his district was pending before school officials or before the Federal Court (76, 77) As said before, at the conclusion of the evidence and argument of counsel, the Court held that no evidence had been produced to support any charge made by the Petitioner.

ARGUMENT**

I

The Petitioner Does Not Present a Case for Review By This Court Under 28 USCA § 1257(3)

This section requires that a ". . . title, right, privilege or immunity is specially set up or claimed under the Constitution. . . :"

The suit does not allege that Petitioner *himself* has been denied any constitutional right. This is a suit by an individual taxpayer. It is not a class suit. It is not brought on behalf of his child who is in elementary school. He does not, and could not, allege that he (or even his child) has been refused admission to any school because of his race since his child lives within the Drew-Kemper district and no application for transfer has ever been made. No discrimination against him (or even his child) is claimed by reason of the district lines of Drew-Kemper. The relief sought (solely a declaration that the bonds are invalid) is entirely unrelated and foreign to the constitutional rights of the Petitioner.

Only those who have been injured as a result of a denial of constitutional rights can invoke the jurisdiction of the Supreme Court on constitutional questions. *Tileston* v. *Ullman*, 318 U.S. 44, 63 S. Ct. 493 (1943). See *Voeller* v. *Neilston Warehouse Co.*, 61 S. Ct. 376, at 378; 311 U.S. 531, 85 L. Ed. 322 (1941). The exception to this rule allowing one in a representative capacity to assert such rights for a third party

** The petition has incorrectly stated the language of the trial court on page 10. The Court did *not* say the "Board had no duty to bring about elimination of racial segregation" as there stated, but the language of the Court was to the effect it did not think "there was any duty to promote integration" (Petition, 30a).

where the third party cannot effectively vindicate his constitutional rights except through such representative, (*N.A.A.C.P.* v. *Alabama,* 78 S. Ct. 1163, 357 U.S. 449, 2 L. Ed. (2) 1488 (1958)) does not apply here. Here the Petitioner is not purporting to act in a representative capacity; nor is there any showing or even allegation that the rights of negroes generally in the Arlington schools can be vindicated only through the Petitioner. On the contrary, his individual contentions seemed opposed to the wishes of a majority of the parents in the Drew-Kemper district, whose Parent Teachers Association voted 89 to 18 in favor of the proposal subsequently adopted by the School Board. (91, 92)

II

There Is No Substantial Federal Question Involved

Petitioner asserts (Petition, 9) as one of the reasons relied on for the allowance of the writ, that "whether public school construction may be arbitrarily sited where its use by any of the white children in the use of the school system would be unlikely, is a Federal question of substance." This assertion has no validity because the record in the case clearly shows that the public school construction in this case was not arbitrarily sited but the decision as to the site on which the improvement should be made, was arrived at only after lengthy consideration of the educational, economic and other factors concerned in the placement of the improvement. The Trial Court said, "I don't think there has been any evidence produced to the Court that they had any other choice." (Petition 30a) The Petitioner did not attack the boundaries of the Drew-Kemper school district, but his sole argument was directed to whether or not the needed improvement

should be made as an alteration to the existing building or whether or not the improvement should be located at or near the periphery of the Drew-Kemper area. A reading of the testimony in this case and particularly of the School Board members who testified, clearly shows that the determination of the School Board was arrived at only after exhaustive studies of the possibilities available to them, and in any event, the determination was one within the discretion of the School Board and cannot be said in any sense of the word to be arbitrary or based upon racial grounds. (144, 145).

Petitioner, in the Trial Court, and also in his Brief, contends that the "unexpressed purpose" of the School Board in seeking to have the additional construction to an existing school is to continue to discriminate against negro children. This is equally without merit. In the first place, not only was the assertion not proven by the Petitioner in the Trial Court, but Petitioner overlooks the fact that the bond issue was approved by the general electorate of the County and that the express purpose stated by the Respondents in asking the public to approve the bond issue was to make the proposed addition exactly in the manner to which the Petitioner objects, and it was the general electorate of the County who expressed their purpose in approving the bond issue, and this purpose is the controlling one.

Petitioner in this case did not attack the geographical boundaries of the particular school district, but throughout his brief, Petitioner seeks to create an aura that the Arlington County schools are being administered on a racially discriminatory basis and that the particular school construction to be financed by the bond issue attacked here would somehow further continued discrimination against negro school children. In

Thompson v. *Arlington County School Board*, 204 Fed. Supp. 620, Judge Lewis of the U. S. District Court for the Eastern District of Virginia, on March 1, 1962, found that the Arlington County public schools are being administered on a racially non-discriminatory basis and that all pupils residing in Arlington County are assigned to the respective school districts in which they reside, regardless of race or color. In that same case, the Court also found that the Arlington County School Board rule that "no child shall be compelled to attend a school in which his race is in the minority" was not invalid.

It should be remembered that, regardless of the adequacy of the allegations, there was no proof to support them and the Court so stated in dismissing the motion for judgment. (Petition, 30a). The effort here, to have the Supreme Court of the United States prevent a local School Board from exercising its judgment on a strictly local question, i.e. what is the best solution to the need for additional classrooms in a particular area of the County, seems to seek a rather drastic Federal intrusion into local government operations. If the local government cannot issue bonds to build classrooms where needed in a predominantly colored district, then certainly the Federal prohibition would apply if the district were predominantly white. This, for Arlington and for perhaps most school divisions, would bring school construction to a halt.

Finally, the pendency of this suit by the individual Petitioner has effectively prevented the sale of the bonds on the open market, and is preventing construction of much needed and much desired classrooms for the children in the Drew-Kemper area.

respectfully submitted that the Petition should
ed.

WILLIAM J. HASSAN
PETER J. KOSTIK
Court House
Arlington, Virginia
Counsel for the County Board of Arlington County, Virginia, Respondent

JAMES H. SIMMONDS
15th St. & N. Courthouse Road
Arlington, Virginia
Counsel for the County School Board of Arlington County, Virginia, Respondent